Supreme Court, U.S.
FILED
SEP 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-637

In the Supreme Court of the United States

OCTOBER TERM 1987

COMMUNICATIONS WORKERS OF AMERICA and ITS LOCALS 2100, 2101, 2108, and 2110,
Petitioners,

v.

HARRY E. BECK, JR., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AND APPENDIX BY SENATORS JESSE HELMS, STROM THURMOND, DAN QUAYLE, AND STEVEN SYMMS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

*THOMAS A. FARR
W. W. TAYLOR, JR.
ROBERT A. VALOIS
MAUPIN TAYLOR ELLIS & ADAMS, P.A.
3201 Glenwood Avenue
Raleigh, North Carolina 27612
Telephone: (919) 781-6800

Counsel for Senators Jesse Helms, et al., *as* amicus curiae

**Counsel of Record*

FANNON PRINTING CENTER, ALEXANDRIA, VIRGINIA 22301 (703) 683-5600

QUESTIONS PRESENTED

I. Do collective bargaining agreements negotiated under the authority of the National Labor Relations Act violate the First Amendment if they require employees to support financially the political activities of a union as a condition of employment?

II. Are collective bargaining agreements that compel employees to support financially the political activities of a union as a condition of employment authorized by section 8(a)(3) of the National Labor Relations Act?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
STATEMENT OF THE CASE	2
I. Statutory Background	2
II. The Proceedings Below	7
SUMMARY OF ARGUMENT	13
ARGUMENT	15
I. Plaintiffs have stated a cause of action under the First Amendment	15
II. Section 8(a)(3) of the NLRA should be given the same construction this Court has given Section 2, Eleventh of the RLA	25
CONCLUSION	30

TABLE OF AUTHORITIES

CASES: Page

Abood v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977) . *passim*

Adair v. *United States*, 208 U.S. 161 (1908) 18

Allen v. *Bhd. of Ry. Clerks*, 373 U.S. 113 (1963) ... *passim*

Arlan's Dep't Store, Inc., 131 NLRB 565 (1961) 4

Blum v. *Yaretsky*, 457 U.S. 991 (1982) 15

Caroline Farms Division of Textron, Inc. v. *NLRB*, 401 F.2d 205 (4th Cir. 1968) 20

The Citizens Co. v. *Asheville Typographical Union, No. 263*, 187 N.C. 42, 121 S.E. 31 (1924) 18

Colautti v. *Franklin*, 439 U.S. 379 (1979) 28

Crowell v. *Benson*, 285 U.S. 22 (1932) 25

Ellis v. *Bhd. of Ry. Clerks*, 466 U.S. 435 (1984) ... *passim*

Gibbs & Cox, Inc., 280 NLRB No. 110 (1986) 4

Hudgens v. *NLRB*, 424 U.S. 507 (1976) 15

Int'l Ass'n of Machinists v. *Street*, 367 U.S. 740 (1961) ..... *passim*

J. I. Case Co. v. *NLRB*, 321 U.S. 332 (1944) 24

Jackson v. *Metropolitan Edison Co.*, 419 U.S. 335 (1974) 24

Lord v. *Local 2088, Int'l Bhd. Elec. Workers*, 646 F.2d 1057 (5th Cir. 1981), *cert. denied*, 458 U.S. 1106 (1982) 5

Lugar v. *Edmonson Oil Co.*, 457 U.S. 922 (1982) 15

Modine Mfg. Co. v. *Grand Lodge Int'l Ass'n of Machinists*, 216 F.2d 326 (6th Cir. 1954) 20-21

Montgomery Ward & Co., Inc., 162 NLRB 369 (1966). 20

TABLE OF AUTHORITIES continued

CASES: Page

Mountain States Tel. & Tel. Co. v. *Pueblo of Santa Ana*, 472 U.S. 237 (1985) 28

NLRB v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967) 18, 25

NLRB v. *Borg-Warner Corp.*, 356 U.S. 342 (1958) .. 4

NLRB v. *Gen. Motors Corp.*, 373 U.S. 734 (1963)... 6, 20, 26, 27

NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1936) 18

Northcross v. *Bd. of Educ. of Memphis City Schools*, 412 U.S. 427 (1973) 25

Oscar Mayer & Co. v. *Evans*, 441 U.S. 750 (1979) .. 25, 28

Pattern Makers League of N. Am. v. *NLRB*, 473 U.S. 95 (1985) 12

Radio Officers' Union v. *NLRB*, 347 U.S. 17 (1954) .. 6, 24, 26, 27

Railway Employes' Dep't v. *Hanson*, 351 U.S. 225 (1956) ..... *passim*

Steele v. *Louisville & N.R. Co.*, 323 U.S. 192 (1944) . 17, 18, 21, 25

United Bhd. of Carpenters v. *Scott*, 463 U.S. 825 (1983) 15

United States v. *Morton*, 467 U.S. 822 (1984) 28

United Steelworkers v. *Weber*, 443 U.S. 193 (1979).. 24, 25

Vaca v. *Sipes*, 386 U.S. 171 (1967) 17, 19, 21, 25

Weinberger v. *Hynson, Wescott, and Dunning, Inc.*, 412 U.S. 609 (1973) 30

Westinghouse Elec. Corp., 227 NLRB 1932 (1977) 4

West Virginia Bd. of Educ. v. *Barnette*, 319 U.S. 624 (1943) 21

TABLE OF AUTHORITIES continued

UNITED STATES CONSTITUTION: *Page*

First Amendment ..... *passim*

STATUTES AND RULES:

Federal Election Campaign Act, 2 U.S.C. §§ 431-455 .. 28

National Labor Relations Act:

Section 1, 29 U.S.C. § 151 ..... 2, 16, 25, 29

Section 7, 29 U.S.C. § 157 ..... 15, 29, 30

Section 8(a)(2), 29 U.S.C. § 158(a)(2) 4

Section 8(a)(3), 29 U.S.C. § 158(a)(3) ..... *passim*

Section 8(a)(5), 29 U.S.C. § 158(a)(5) 4, 17

Section 8(b), 29 U.S.C. § 158(b) 20

Section 8(d), 29 U.S.C. § 158(d) 2, 16, 17

Section 9(a), 29 U.S.C. § 159(a) ..... *passim*

Section 9(c)(1)(A), 29 U.S.C. § 159(c)(1)(A) ... 4

Section 10(b), 29 U.S.C. § 160 19

Section 14(b), 29 U.S.C. § 164(b) 5, 22

Section 19, 29 U.S.C. § 169 23

Section 301, 29 U.S.C. § 185 20

42 U.S.C. § 2000e, *et seq.* 24

Railway Labor Act:

Section 1a, 45 U.S.C. § 151a 5, 8, 25

Section 2, Fourth, 45 U.S.C. § 152 Fourth .... *passim*

Section 2, Eleventh, 45 U.S.C. § 152 Eleventh . *passim*

Rule 36.2 of the Rules of the Supreme Court of the United States 1

TABLE OF AUTHORITIES continued

Page

49 Stat. 449 (1935) (The Wagner Act) 7

61 Stat. 136 (1947) (Taft-Hartley Act) 26

67 Stat. 1238 (1951) (45 U.S.C. § 152 Eleventh) 26

MISCELLANEOUS:

I. Brant, *James Madison: The Nationalist* 354 (1948) . 21

Bureau of National Affairs, *Collective Bargaining; Negotiations and Contracts* (1986) 6

Cantor, *Uses and Abuses of Agency Shop,* 59 Notre Dame L.Rev. 61 (1983) 6

96 Cong. Rec. 15,737, 16,267 (1950) 26

126 Cong. Rec. 2579-86, 2652-53, 34006-07 (1980) 24

130 Cong. Rec. 6178-81 (daily ed. May 22, 1984) 28

132 Cong. Rec. 5553-54 (daily ed. Aug. 6, 1986) 28

Dep't. of Labor, *Characteristics of Major Collective Bargaining Agreements* (Jan. 1980) 6

T. Haggard, *Compulsory Unionism, the NLRB and the Courts* (Lab. Rel. & Pub. Pol'y Series No. 15, 1977) 6

D. Heldman, J. Bennett, and M. Johnson, *Deregulating Labor Relations* (1981) 6

H.R. Rep. No. 2811, 81st Cong., 2d Sess. (1950) 26

H.R. Rep. No. 96-496, 96th Cong., 2d Sess. (1980) 24

Idaho Voters Keep Right to Work Law, Daily Lab. Rep. (BNA) No. 215 (Nov. 6, 1986) 5

Law Reprints Labor Series, Vol 12, no. 13, '78-'79 Term, Brief for the Respondents in *United Steelworkers* v. *Weber* 24-25

TABLE OF AUTHORITIES continued

Page

Legislative History of the Labor Management Relations Act, 1947 (1948) 26

2 *The Writings of James Madison* 186 (Hunt ed. 1901) 30

K. McGuiness, *How to Take a Case Before the National Labor Relations Board* (3d ed. 1967) 7

E. Miller, *An Administrative Appraisal of the NLRB* (Lab. Rel. & Pub. Pol'y Series No. 16, 1980) 19

C. Morris, *The Developing Labor Law* (2d ed. 1983) . 5

NLRB Casehandling Manual (Part Two) Representation Proceedings 4, 7

S. Rep. No. 105, 80th Cong., 1st Sess. (1947) 26

S. Rep. No. 2262, 81st Cong., 2d Sess. (1950) 26

R. Williams, *NLRB Regulation of Election Conduct* (Lab. Rel. & Pub. Pol'y Series No. 8, 1985) 3

Vieira, *Of Syndicalism, Slavery, and the Thirteenth Amendment: The Unconstitutionality of Exclusive Representation in the Public Sector,* 12 Wake Forest L.Rev. 515 (1976) 19

In the Supreme Court of the United States

OCTOBER TERM 1987

No. 86-637

COMMUNICATIONS WORKERS OF AMERICA and
ITS LOCALS 2100, 2101, 2108, and 2110,
Petitioners,

v.

HARRY E. BECK, JR., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF BY SENATORS JESSE HELMS, STROM THURMOND, DAN QUAYLE, AND STEVEN SYMMS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

This *amicus curiae* brief for Senator Jesse Helms is filed with the written consent of all parties. Sup.Ct.R. 36.2. It supports the position of the respondents that they have stated cognizable claims for violations of their First Amendment rights and for a breach of the duty of fair representation owed to them by their collective bargaining representative.

INTEREST OF THE *AMICUS CURIAE*

Jesse Helms is a United States Senator from the State of North Carolina. He was first elected in 1972 and has held office continuously since then. Senator Helms has served as Chairman of the United States Senate Committee on Agriculture, Nutrition and Forestry, and is currently ranking minority member of the Committee on Foreign Relations.

As a member of Congress, Senator Helms has a responsibility to protect and promote the interests of working men

and women in the United States. Throughout his career in the United States Senate, Senator Helms has been particularly concerned about the injustices that result when employees are compelled to support financially the political activities of a union as a condition of employment.

Senator Helms believes that the positions he takes in this brief, particularly those related to the constitutional significance of this case to working men and women in the United States of America, may not otherwise be fully presented to the Court.

Joining with Senator Helms in this brief are United States Senators Strom Thurmond (R. S.C.), Dan Quayle (R. Ind.), and Steven Symms (R. Idaho).

STATEMENT OF THE CASE

I. Statutory Background

The correct resolution of this case cannot be disputed if the facts are analyzed within the context of federal labor law and policy. As noted by the petitioner, the National Labor Relations Act, 29 U.S.C. §§ 151-169 ("NLRA"), "is our nation's basic labor statute, covering virtually the entire private employment sector." Petition for Writ of Certiorari by the Communications Workers of America ("CWA"), at 9. Under the NLRA, a private sector employer is compelled by law to engage in "collective bargaining" with any union that has been "certified" by the National Labor Relations Board ("the NLRB") as an exclusive "collective bargaining representative." The NLRA defines collective bargaining as:

> . . . [T]he performance of the mutual obligation of the employer and [the union] to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . . .[1]

[1] 29 U.S.C. § 158(d).

Under section 9(a) of the NLRA, a union is granted the statutory privilege of "exclusive representation," or the right to represent every employee within a particular "bargaining unit," after the union has been "certified" by the NLRB. Typically, a union is "certified" after the union has won a secret ballot election conducted by the NLRB among a group of employees in a proposed "bargaining unit." The NLRB election process is normally initiated when a union files a petition with the NLRB which states that certain employees wish to be represented by the union for collective bargaining purposes.[2] The NLRB investigates the "representation" petition to determine if the employees' employer is within the jurisdiction of the NLRA and establishes a proposed bargaining unit if jurisdiction and a question concerning representation are found to exist. Employees can be and are included in the proposed bargaining unit without their consent and against their will.[3]

After a proposed bargaining unit is established, the NLRB conducts a secret ballot election in which all of the employees within the unit are eligible to vote on whether they want the union to represent them for purposes of collective bargaining.[4] NLRB-supervised elections are often hotly contested by the union, the employer, and those employees who oppose the union and often involve members of the community and the press. Even if a majority of bargaining unit employees oppose the union, it will still be certified by the NLRB as the exclusive bargaining representative if a bare majority of those employees who vote cast their ballots for union representation.[5] Once the union

---

[2] R. Williams, *NLRB Regulation of Election Conduct* (Lab. Rel. & Pub. Pol'y Series No. 8, 1985) at 5-15; *see also* Appendix at 1a.

[3] *Id.*; *see also*, 29 U.S.C. § 159.

[4] *Id.*; The form ballot used by the NLRB does not ask employees to vote on whether they want to become union members or whether they wish to support the union's political agenda. *See* Appendix at 3a.

[5] *See* Appendix at 5a.

is certified by the NLRB, section 9(a) of the NLRA requires that all employees accept the union as their exclusive bargaining representative, including employees placed in the bargaining unit against their will, employees who voted against the union, employees who did not vote, employees who voted for union representation who have subsequently changed their minds, and employees hired after the election.[6]

After the union is certified by the NLRB, the employer must engage in "good faith" collective bargaining with the union on all "mandatory" subjects of bargaining.[7] Unions and employers do not voluntarily agree on the topics that must be negotiated. Whether a topic is a mandatory subject of bargaining is instead a question of federal law that is ultimately resolved by the NLRB and the fed-

---

[6] *See supra* at n. 3. Employees can petition the NLRB to decertify the union as their collective bargaining agent under section 9(c)(1)(A) of the NLRA. 29 U.S.C. § 159(c)(1)(A). The statutory right to decertify a union has been eviscerated for many employees as a result of two rules of practice developed by the NLRB. First, the NLRB will dismiss a decertification petition or hold it in abeyance if the union files unfair labor practice charges with the NLRB in which the union alleges violations of sections 8(a)(2) or 8(a)(5) of the NLRA, 29 U.S.C. §§ 8(a)(2) and (a)(5). *See NLRB Casehandling Manual (Part Two) Representation Proceedings* § 11730.3. Second, the unit for purposes of a decertification election is coextensive with the "contract unit" and not the bargaining unit that was initially certified by the NLRB. *Arlan's Dep't Store, Inc.*, 131 NLRB 565, 567 n. 7 (1961). Under this doctrine, if a majority of voting employees vote for union representation at a local facility, and if the union and employer subsequently consent to the application of a national agreement to the local facility, employees at the local facility are thereafter precluded from decertifying the union as their collective bargaining representative unless: (a) thirty percent of the employees working at *all* of the facilities to which the national agreement has been applied authorize the filing of a decertification petition; and (2) a majority of voting employees from all of the facilities vote for decertification in a NLRB-supervised election. *See Gibbs & Cox, Inc.*, 280 NLRB No. 110 (1986); *Westinghouse Elec. Corp.*, 227 NLRB 1932 (1977).

[7] 29 U.S.C. §§ 158(a)(5); *NLRB* v. *Borg-Warner Corp.*, 356 U.S. 342 (1958).

eral courts.[8] The source for one of the mandatory subjects is found in section 8(a)(3) of the NLRA, which states:

> [N]othing in this subchapter, or any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . .[9]

Provisions in collective bargaining agreements that require "union membership" are known as "union security agreements." [10] Twenty-one states have exercised their prerogative under section 14(b) of the NLRA to outlaw union security agreements within their borders.[11] In the other 29 states the question of union security is a mandatory subject of bargaining. An employer is *required* by law to negotiate with a union whether the collective bargaining agreement ultimately executed by the parties will require "union mem-

---

[8] *Id.* An employer has the option of bypassing the NLRB election process if it is willing to voluntarily recognize the union as the bargaining representative for a majority of the employer's employees. An employer who has recognized a bargaining representative is still bound to negotiate all mandatory subjects of bargaining. The effect on an individual employee of an employer's decision to voluntarily recognize a union is *identical* to the effect of a NLRB election in which a majority of voting employees vote for union representation. In both instances, the union is granted the statutory right under section 9(a) to represent all of the employees in the bargaining unit and individual employees lose their right to negotiate their own employment contracts. *See* C. Morris, *The Developing Labor Law*, at 488-549 (2d ed. 1983).

[9] 29 U.S.C. § 158(a)(3).

[10] Morris, *supra*, n. 8 at 1359-1367.

[11] 29 U.S.C. § 164(b); *Idaho Voters Keep Right to Work Law*, [1986] Daily Lab. Rep. (BNA) No. 215, at A-9 (Nov. 6, 1986). Right-to-work laws do not protect employees of the federal government or employees covered by the Railway Labor Act, 45 U.S.C. §§ 151-188. The fifth circuit has ruled that right-to-work laws do not apply to private sector employees working on federal properties located in right-to-work states. *See Lord* v. *Local 2088, Int'l Bhd. of Elec. Workers*, 646 F.2d 1057 (5th Cir. 1981), *cert. denied*, 458 U.S. 1106 (1982).

bership'' as a condition of employment.[12] In the states that have chosen to allow union security agreements, ninety percent of the collective bargaining agreements covering more than 6,000,000 workers contain such clauses.[13]

Union security agreements negotiated under the NLRA almost without exception track the statutory language of section 8(a)(3) and state that ''union membership'' is a required condition of employment for all employees.[14] The agreements typically do not inform employees that the definition of ''membership'' under section 8(a)(3) has been ''whittled to its financial core.'' [15] The purpose of section 8(a)(3) is to insure that all employees who receive the ''benefits'' of collective bargaining share in the expenses reasonably associated with the union's performance of its role as collective bargaining representative.[16] A collective bargaining agreement may therefore be enforced against dissenting employees only to the extent they are compelled to pay union dues.[17]

Collective bargaining agreements that require ''union membership'' as a condition of employment have historically been known as ''union shop'' agreements. Contracts that require only the payment of fees to the union are called ''agency shop'' agreements. Union shop and agency shop agreements are ''practical equivalent[s]'' since only

---

[12] *NLRB* v. *Gen. Motors Corp.*, 373 U.S. 734 (1963).

[13] Bureau of Nat. Affairs, *Collective Bargaining; Negotiations, and Contracts* at 87-3 (1986); United States Dep't of Labor, *Characteristics of Major Collective Bargaining Agreements*, at 1, 3, 23-24 (Jan. 1980).

[14] Cantor, *Uses and Abuses of the Agency Shop*, 59 Notre Dame L.Rev. 61 n.2 (1983); T. Haggard, *Compulsory Unionism, the NLRB and the Courts*, at 69, 70 (Lab. Rel. & Pub. Pol'y Series No. 15, 1977); D. Heldman, J. Bennett & M. Johnson, *Deregulating Labor Relations*, at 70, 71 (1981).

[15] *Id.*; *NLRB* v. *Gen. Motors Corp.*, 373 U.S. at 742.

[16] *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 41 (1954).

[17] *NLRB* v. *Gen. Motors Corp.*, 373 U.S. at 742.

"financial membership" can be required of dissenting employees under the authority of section 8(a)(3).[18]

II. The Proceedings Below

Over the past fifty years, hundreds of thousands of employees, like Harry Beck and his nineteen fellow plaintiffs, have been compelled under the authority of the NLRA to pay union dues to preserve their employment.[19] Plaintiffs are employed by the American Telephone and Telegraph Company and its subsidiaries ("AT&T"). Representation petitions were filed by the CWA with the NLRB, and plaintiffs were placed in proposed bargaining units by the NLRB without their consent.[20] A majority of employees who voted in NLRB-supervised elections voted to select the CWA as their bargaining representative. The CWA was then certified by the NLRB as the collective bargaining representative for all employees, including plaintiffs and others who voted against the union. The collective bargaining agreements ultimately executed by CWA and AT&T contain "agency shop" provisions. Plaintiffs are not signatories to the collective bargaining agreements and never consented to the agency shop provisions. Plaintiffs exercised their right to refrain from becoming union members and elected to meet their "membership" obligations by paying the CWA "agency fees" in an amount equivalent to union dues.

There has never been any dispute that substantial portions of the union dues and agency fees collected by the CWA are used by the union for political purposes. Having first been forced by federal law to accept the CWA as their bargaining representative, plaintiffs also discovered that

---

[18] *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 217 n. 10 (1977).

[19] The original version of the NLRA, the Wagner Act, was enacted in 1935. 49 Stat. 449 (1935).

[20] NLRB rules prevent interested employees from intervening or even having a voice in unit determination issues. *See NLRB Casehandling Manual (Part Two) Representation Proceedings*, § 11194.3; K. McGuiness, *How to Take a Case Before the National Labor Relations Board*, at 98 (3d ed. 1967).

their compulsory agency fees were being used to support both candidates and causes they opposed. Because of their belief that Americans should be free to choose the political activities they support, plaintiffs commenced this action on 3 June 1976 in the United States District Court for the District of Maryland.

Plaintiffs' complaint alleges that the CWA has used portions of plaintiffs' compulsory fees for political and other purposes unrelated to "collective bargaining, contract administration and grievance adjustment." Plaintiffs contend that such expenditures violate their First Amendment rights of free speech and association and that the challenged expenditures constitute a violation of the CWA's duty to "fairly represent" all employees within the bargaining units. To remedy these violations plaintiffs seek a declaratory judgment establishing the illegality of CWA's expenditures; injunctive relief limiting future payments by plaintiffs to their share of the costs of collective bargaining, contract administration and grievance adjustment; and a refund for past illegal collections by the CWA.

The legal foundation for plaintiffs' claims was laid in three decisions of this Court between 1956 and 1963 interpreting the Railway Labor Act ("RLA").[21] The RLA applies to unions and employers in the railway and airline industries. Under section 2, Fourth, a majority of employees employed in a particular "craft" have the right to designate a particular union as the exclusive bargaining representative for all employees in that craft.[22] Under section 2, Eleventh, the exclusive representative is entitled to negotiate collective bargaining agreements that require union "membership" as a condition of employment.[23] In all material respects, section 2, Fourth and section 2, Eleventh are identical in language, scope, and operation to section 9(a) and section 8(a)(3) of the NLRA.[24]

---

[21] 45 U.S.C. §§ 151-188.

[22] 45 U.S.C. § 152, Fourth.

[23] 45 U.S.C. § 152, Eleventh.

[24] 29 U.S.C. §§ 158(a)(3), 159(a).

In *Railway Employes' Dep't* v. *Hanson*, the plaintiffs claimed that a union shop provision negotiated under the authority of section 2, Fourth, and section 2, Eleventh violated their First Amendment rights.[25] The Court found that plaintiffs had stated a constitutional cause of action.[26] The Court avoided the constitutional issue by construing section 2, Eleventh as authorizing only agreements that require dissenting employees to pay union dues to the extent those dues relate "to the work of the union in the realm of collective bargaining."[27] The Court concluded that Congress, pursuant to its authority under the Commerce Clause, could require the financial support of the bargaining agent by all who "receive the benefit of its work."[28] Though finding the challenged provisions of the RLA to be constitutionally valid, the Court cautioned that, "[i]f the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case."[29] "[T]hat case" came before the Court five years later in *Int'l Ass'n of Machinists* v. *Street*.[30]

Instead of attacking the constitutionality of section 2, Eleventh, the plaintiffs in *Street* objected to the use of their compulsory dues for political purposes.[31] The Court stated that "the record [in *Street*] is adequate squarely to present the constitutional question reserved in *Hanson*."[32] The Court concluded that in enacting section 2, Eleventh, Congress had contemplated only the authorization of union shop provisions that "force[d] employees to share the costs of negotiating and administering collective agree-

---

[25] 351 U.S. 225 (1956).

[26] 351 U.S. at 232.

[27] 351 U.S. at 235.

[28] 351 U.S. at 238.

[29] *Id.*

[30] 367 U.S. 740 (1961).

[31] 367 U.S. at 744.

[32] 367 U.S. at 749.

ments, and the costs of the adjustment and settlement of [contract] disputes."[33] Section 2, Eleventh was construed to "deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes."[34]

In *Allen* v. *Bhd. of Ry. Clerks*, the Court reaffirmed its decision in *Street* and also gave additional instructions regarding the remedies available to dissenting employees.[35] Employees who do not choose to support a union can be charged their share of all union expenditures that are "germane" to collective bargaining.[36] A dissenting employee is entitled to restitution of any amount of his compulsory union dues that are used for politics and other activities that are not germane to collective bargaining and a reduction in that same percentage of future dues that he can be compelled to pay.[37]

Subsequent to the filing of this action, the principles announced in *Hanson*, *Street*, and *Allen* were applied to public-sector employees in *Abood* v. *Detroit Bd. of Educ.*[38] The district court in the instant case agreed with plaintiffs that the decisions under the RLA and in *Abood* are controlling on the issues raised by plaintiffs under the NLRA.[39] The district court ruled that collections by the CWA from objecting employees in an amount "beyond that allocable to collective bargaining, contract administration, and grievance adjustment" are violative of "the First Amendment

---

[33] 367 U.S. at 764.

[34] 367 U.S. at 768-69.

[35] 373 U.S. 113 (1963).

[36] 373 U.S. at 121.

[37] 373 U.S. at 120, 121.

[38] 431 U.S. 209 (1977).

[39] The CWA also agreed that *Hanson*, *Street*, *Allen* and *Abood* were controlling until it filed a motion to dismiss the complaint almost six years after this case was filed. *Beck* v. *Communications Workers of Am.*, 776 F.2d 1187, 1191-1195 (4th Cir. 1985), *aff'd*, 800 F.2d 1280 (4th Cir. 1986).

rights of plaintiffs."[40] A special master was appointed to determine "what proportion of the union's total expenditures is attributable to activities other than collective bargaining, contract administration, and grievance adjustment."[41]

A final judgment was entered by the district court following two references to the special master, 4,000 pages of testimony, and the introduction into evidence of more than 3,000 documents.[42] Among the findings by the district court was a determination that *only twenty-one percent* of the agency fees collected from plaintiffs had been used by the CWA for collective bargaining, contract administration, and grievance adjustment and that plaintiffs are entitled to a refund of the remaining seventy-nine percent.[43]

Following the district court's entry of judgment, this Court issued *Ellis* v. *Bhd. of Ry. Clerks,* its fourth decision construing section 2, Fourth and section 2, Eleventh of the RLA.[44] The *Ellis* decision clarified the Court's rulings in *Hanson, Street, Allen,* and *Abood* in several important respects, two of which are of greatest importance to this appeal. First, the Court more precisely described the types of union expenditures non-union employees can be compelled to support. The proper test under section 2, Eleventh is whether the challenged expenditures "are necessarily or reasonably incurred for the purpose of [the union] performing the duties of an exclusive [bargaining] representative . . . ."[45] More importantly, this Court expressly ruled that the *First Amendment* prohibits *private-sector unions* from collecting fees from dissenting employees to the extent those fees are used for political and

---

[40] *Beck,* 468 F.Supp. 93, 96 (D.Md. 1979).

[41] *Id.*

[42] *Beck,* 776 F.2d at 1194.

[43] *Beck,* No. M-76-839, slip op. (D.Md. Aug. 9, 1983).

[44] 466 U.S. 435 (1984).

[45] 466 U.S. at 448.

other activities that are not germane to collective bargaining.[46]

The CWA argues on appeal that plaintiffs have failed to state a claim upon which relief can be granted. The CWA concedes, as it must, that it cannot force the plaintiffs to become union members and that under the applicable collective bargaining agreements, plaintiffs can be compelled only to financially support the CWA.[47] The CWA does assert that because its authority derives from the NLRA as opposed to the RLA, Congress has granted it license, by virtue of its position as plaintiffs' exclusive bargaining representative, to spend plaintiffs' compulsory agency fees for politics and other purposes that have no relationship whatsoever to the performance of its duties as bargaining representative.[48]

On October 24, 1985, a panel of the fourth circuit voted 2 to 1 to affirm the district court's judgment, agreeing with "both the statutory and constitutional claims of plaintiffs."[49] On September 12, 1986, an *en banc* ruling was issued that reaffirmed the district court's decision in relevant part.[50]

---

[46] *Id.* Based on the *Ellis* decision, remand of this case would seem necessary. In *Allen*, the Court ruled that unions, and not dissenting employees, must bear the burden of proving the proportion of plaintiffs' compulsory fees that is used for permissible activities. 373 U.S. at 122. In *Ellis*, this Court ruled that the union may meet this burden by the preponderance of the evidence. 466 U.S. at 457 n. 15. The special master applied the clear and convincing standard of proof in making the calculations the district court incorporated into its judgment. *Beck*, 776 F.2d at 1209-1213.

[47] *Pattern Makers League of N. Am.* v. *NLRB*, 473 U.S. 95 (1985).

[48] The CWA has apparently conceded that if plaintiffs have in fact stated a claim, the standards for permissible expenditures established by *Ellis* are controlling.

[49] *See infra* n. 50.

[50] *Beck*, 776 F.2d 1187 (4th Cir. 1985), *aff'd*, 800 F.2d 1280 (4th Cir. 1986) (en banc). Six of the judges of the fourth circuit voted to sustain federal jurisdiction while four voted to dismiss the case. All of the judges in the majority sustained plaintiffs' argument

SUMMARY OF ARGUMENT

While the First Amendment protects against state or governmental action and not from wrongs done by individuals, plaintiffs have stated a cause of action under the First Amendment. The provisions of the collective bargaining agreement challenged by plaintiffs must be attributed to the government since the express public policy of the United States encourages the process of collective bargaining.

The NLRA grants a certified collective bargaining representative the statutory right to serve as the exclusive representative for all employees in a bargaining unit. The powers exercised by a certified representative have been *expressly created by Congress* and are comparable to powers possessed by a legislature. The statutory privilege of exclusive representation operates to "extinguish" an employee's common law right to negotiate his own employment contract. Employees are compelled by Section 9(a) of the NLRA to associate with a union to the extent employees must accept a union as their bargaining representative. Section 9(a) is the source of the power by which the rights of private-sector employees are lost.

Collective bargaining is also encouraged by the federal government in three other significant ways under the NLRA. First, the NLRB often plays an active and essential role in the actual formation of a collective bargaining representative. Second, employers and collective bargaining representatives do not voluntarily select the topics that must be negotiated. Instead, employers are required by federal law to negotiate over wages, hours and other terms and conditions of employment known as mandatory subjects of bargaining. Whether a particular subject is a

---

that CWA had breached its duty of fair representation. The court split 5 to 5 on whether section 8(a)(3) prohibits agreements that condition employment on the payment of agency fees in an amount equal to union dues. Two judges voted to sustain plaintiffs' constitutional claims. Five judges voted to dismiss the constitutional claims, while three found it unnecessary to decide them.

"mandatory" subject of bargaining is a question of federal law that is ultimately decided by the NLRA and the federal courts. Finally, the General Counsel of the NLRB has been given *exclusive* authority to enforce the statutory privileges granted to collective bargaining representatives by the NLRA.

The collective bargaining agreements challenged by plaintiffs have been negotiated as a result of significant "encouragement" by the federal government and therefore must be attributed to the state. Any interference with plaintiffs' First Amendment rights resulting from the requirement that plaintiffs accept the CWA as their bargaining representative is justified by the Congressional finding that collective bargaining enhances industrial peace. Congress has also found that industrial peace is enhanced to the extent all employees who share in the "benefits" of collective bargaining are required to share in the expenses associated with collective bargaining. No possible governmental interest can be served by requiring employees to support financially the political activities of a union as a condition of employment.

Apart from plaintiffs' constitutional claims, section 8(a)(3) of the NLRA should be given the same interpretation this Court has given to section 2, Eleventh of the RLA. Section 2, Eleventh is based on section 8(a)(3) and was enacted by Congress to give unions under the RLA the same rights granted to unions under the NLRA. Both the RLA and the NLRA were enacted to enhance industrial peace through the process of collective bargaining. The policy underlying both section 8(a)(3) and section 2, Eleventh is to eliminate the problem of the "free-rider"—employees who receive the "benefits" of collective bargaining, but who refuse to share in the related expenses. It is inconceivable that two federal statutes could be found that are more similar or that section 8(a)(3) could be interpreted differently from section 2, Eleventh.

Application of the standards established in *Street* and *Ellis* is also consistent with traditional canons of statutory

construction. Plaintiffs' rights under section 7 of the NLRA to refrain from union activity will be rendered completely inoperative if the petitioner is authorized by section 8(a)(3) to use plaintiffs' compulsory union dues to support candidates and causes opposed by plaintiffs. In contrast, the policies underlying both section 7 and section 8(a)(3) will be effectuated by application of the *Street* and *Ellis* standards to section 8(a)(3). The problem of the "free-rider" will be eliminated if section 8(a)(3) is interpreted as authorizing agreements that require dissenting employees to share in the costs of collective bargaining, while the right to refrain from union activity under section 7 will retain its significance if plaintiffs cannot be forced to subsidize petitioner's political activities as a condition of employment.

ARGUMENT

I. Plaintiffs have stated a cause of action under the First Amendment

The First Amendment protects against state or governmental action and not against wrongs done by individuals.[51] A finding of "state action" is therefore essential to plaintiffs' First Amendment claim.[52] When private parties are charged with constitutional violations, state action exists only when "the conduct allegedly causing the deprivation of a federal right [may] be fairly attributed to the state."[53] Private conduct may be fairly attributed to the state only when the state "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice in law must be deemed that of the state."[54]

Both the CWA and the Solicitor General of the United States argue that section 8(a)(3) merely permits employers and collective bargaining agents to agree on agency shop and that such provisions cannot therefore be attributed to

---

[51] *United Bhd. of Carpenters* v. *Scott*, 463 U.S. 825, 831 (1983).

[52] *Hudgens* v. *NLRB*, 424 U.S. 507, 513 (1976).

[53] *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 937 (1982).

[54] *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982).

the government. This argument is divorced from reality and overly simplistic. The NLRA does provide that the obligation to engage in collective bargaining "does not compel either party to agree to a proposal or require the making of a concession." [55] However, it is not *the employer* who is required to pay union dues pursuant to a contract the employer has negotiated with a union. Union dues must instead be paid by employees who *are not parties to the contract* and who may have voted against the union or have otherwise been included in the relevant bargaining unit against their will.

Neither the CWA nor the Solicitor General explain or analyze the concept of collective bargaining, the way in which a collective bargaining representative is formed, the powers exercised by a collective bargaining representative, the source of the powers exercised by a collective bargaining representative, or the reasons why employers "choose" to negotiate agency shop or any other matter with collective bargaining representatives. The answers to these questions demonstrate that the operation of the NLRA as a whole, and not simply section 8(a)(3) taken out of context, provides the requisite governmental action upon which plaintiffs' constitutional claims are based.

Collective bargaining, as it has *affected the plaintiffs in this case*, is a creature of federal law.[56] The NLRA was enacted to eliminate what Congress perceived as "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms . . . ." [57] In order to remedy this perceived imbalance, Congress declared that it is the "policy of the United

---

[55] 29 U.S.C. § 158(d).

[56] The fact that unions and employers may have been free in some states to negotiate union or closed shop agreements prior to 1935 does not negate the coercive foundation provided by the federal government for the contracts challenged by plaintiffs.

[57] 29 U.S.C. § 151.

States" to "[e]ncourage the practice and procedure of collective bargaining . . . ." [58] The NLRA "encourages" collective bargaining by limiting rights enjoyed at common law by employees and employers and by creating statutory rights for *unions* that have been certified by the NLRB as collective bargaining representatives.

Collective bargaining agreements negotiated under the authority of the NLRA (or the RLA) are not the result of purely private and voluntary decisions. They are quite unlike other contracts since one of the parties, the employer, is often brought to the bargaining table by the force of federal law. Once at the bargaining table, employers are required by federal law "to bargain collectively" with a "collective bargaining representative." [59] Federal law also requires that the topics of negotiation must include "wages, hours, and other terms and conditions of employment" and other mandatory subjects of bargaining, including agency shop.[60]

Certified collective bargaining representatives enjoy privileges that would not exist as a *matter of right* apart from the NLRA. Foremost is the statutory right under section 9(a) to serve as the exclusive representative for all the employees in the bargaining unit.[61] Section 9(a) is identical in all material respects to section 2, Fourth of the RLA.[62] By making bargaining representatives under both the NLRA and the RLA the exclusive representatives for all of the employees in the respective bargaining units or crafts, "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." [63]

---

[58] *Id.*

[59] *See* 29 U.S.C. §§ 158(a)(5), 158(d).

[60] *See supra* at 4, 5.

[61] 29 U.S.C. § 159(a).

[62] 45 U.S.C. § 152, Fourth.

[63] *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192, 198, 202 (1944); *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967).

While federal law acts as a source of rights and privileges for unions, the NLRA operates to *eliminate* certain basic rights and privileges that would otherwise be enjoyed by employees. At common law, "*any individual* or group of individuals have a right to work for whom they please, either individually or collectively, and to contract in any manner they see fit and proper."[64] The federal policy of exclusive representation "*extinguishes* the individual employee's power to order his own relations with his employer and creates a power vested in the [collective bargaining] representative to act in the interest of all employees."[65] Thus, *without regard* to whether a collective bargaining agreement contains a "union shop" provision, federal law compels all employees in a bargaining unit to associate with a certified collective bargaining agent to the extent that all employees must accept it as their bargaining agent.

Private decisions will be attributed to the state when a federal statute is the source of the power and authority by which any private rights are lost or sacrificed.[66] The collective bargaining agreements challenged by plaintiffs were imposed on them pursuant to the statutory privilege of exclusive representation granted to the CWA by an act of Congress. Section 9(a) of the NLRA is the source of the power and authority by which plaintiffs' right to order their own contractual affairs has been lost, sacrificed, and "extinguished."[67]

The enforceability of collective bargaining agreements and the number of employees who would be subject to collective bargaining agreements would be geometrically re-

---

[64] *The Citizens Co.* v. *Asheville Typographical Union, No. 263,* 187 N.C. 42, 49, 121 S.E. 31 (1924) (emphasis added); *see also NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 102 (1936) (McReynolds, J., dissenting); *Adair* v. *United States*, 208 U.S. 161 (1908).

[65] *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (emphasis added).

[66] *Railway Employes' Dep't* v. *Hanson*, 351 U.S. at 232, *quoting Steele* v. *Louisville & N.R. Co.*, 323 U.S. at 198-199, 204.

[67] *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. at 180.

duced absent the encouragement provided by the government under section 9(a) of the NLRA and section 2, Eleventh of the RLA.[68] However, the NLRA also operates to encourage the process of collective bargaining in several other important areas. First, as discussed above, under the NLRA, the federal government "encourages" collective bargaining by playing an active and essential role in the formation of a collective bargaining agent.[69] Second, employers and collective bargaining representatives do not voluntarily select the topics that must be negotiated. Employers are instead required by federal law to negotiate all mandatory subjects of bargaining, including agency shop.[70] Finally, the NLRA encourages collective bargaining by vesting in the General Counsel of the NLRB the *exclusive authority* to enforce the rights and privileges established by the NLRA.

Under section 8(a) of the NLRA, employers are prohibited from engaging in a list of enumerated "unfair labor practices." [71] Should a collective bargaining representative or any other person conclude that an employer has committed an unfair labor practice, their only recourse is to file an unfair labor practice charge with the General Counsel of the NLRB.[72] The General Counsel will dismiss the charge if she concludes that no violation has been committed. If the General Counsel concludes that an unfair labor practice has been committed, she or her agents will issue a complaint against the offending employer. The General Counsel has *unreviewable discretion* to decide whether a complaint will be issued and the unfair labor practice charges litigated.[73]

---

[68] *See* Vieira, *Of Syndicalism, Slavery, and the Thirteenth Amendment: The Unconstitutionality of Exclusive Representation in the Public Sector*, 12 Wake Forest L.Rev. 515, 551-626 (1976).

[69] *See supra* at 2-4.

[70] *See supra* at 4, 5.

[71] 29 U.S.C. § 158(a).

[72] 29 U.S.C. § 160(b); E. Miller, *An Administrative Appraisal of the NLRB*, at 15-27 (Lab. Rel. & Pub. Pol'y Series No. 16, 1980).

[73] *Id.*; *see also Vaca* v. *Sipes*, 386 U.S. at 913.

If the General Counsel issues a complaint, she will attempt to prove the allegations before an administrative law judge. The decision by the administrative law judge may be appealed by either the General Counsel or the employer to the five-member National Labor Relations Board. Any adverse decision of the NLRB may be appealed by either party to a federal court of appeals. At all stages, the unfair labor practice charges are prosecuted by the General Counsel, including any action in the court of appeals to enforce an order by the NLRB directing the employer to cease and desist from unlawful conduct.[74]

It is within this reality that an employer "agrees" to engage in collective bargaining with a collective bargaining representative. Once a union is certified by the NLRB, an employer who refuses to engage in collective bargaining will be sued by the General Counsel of the NLRB.[75] Should the employer refuse to negotiate over the inclusion of an agency shop provision in a prospective collective bargaining agreement, he will be sued by the General Counsel of the NLRB.[76] Most importantly, should an agency or union shop provision be included in a collective bargaining agreement, and should an employee refuse to pay agency fees on the ground that portions of those fees are being used by the collective bargaining representative for political purposes, and should the employer refuse to discharge that employee, the employer will be sued by the General Counsel of the NLRB.[77] In such circumstances, the General Counsel

---

[74] *See supra* n. 72. Union unfair labor practices are enumerated in section 8(b) of the NLRA, 29 U.S.C. § 158(b), and are investigated and processed by the General Counsel in the same fashion as employer unfair labor practices.

[75] *See supra* n. 7.

[76] *NLRB* v. *Gen. Motors Corp., supra; Caroline Farms Division of Textron, Inc.* v. *NLRB*, 401 F.2d 205 (4th Cir. 1968).

[77] *Montgomery Ward & Co., Inc.*, 162 NLRB 369 (1966). A union also has the option of suing an employer for breach of contract under section 301 of the NLRA, 29 U.S.C. § 185, if an employer refuses to force its employees to comply with any "membership" obligations contained in a collective bargaining agreement. *Modine*

will find herself engaged in the "sinful and tyrannical" act of "compel[ling] a man to furnish contributions of money for the propagation of opinions which he disbelieves."[78] Such conduct by the General Counsel must be prohibited under "our constitutional constellation" since "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."[79]

This Court has previously acknowledged that the authority of bargaining agents under the RLA and the NLRA is based upon governmental action. "Grave constitutional problems" under section 9(a) of the NLRA and section 2, Fourth of the RLA were avoided by this Court's interpretation of both statutes in *Steele* v. *Louisville & N.R. Co.* and *Vaca* v. *Sipes.*[80] While finding that both sections were intended by Congress "to clothe the bargaining representative with powers comparable to those possessed by a legislature," the Court also ruled that Congress did not intend to "confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority."[81] The Court avoided the "grave constitutional problems" by construing both statutes as imposing a duty on the bargaining representative to "fairly" represent all members of the bargaining unit.[82]

In *Railway Dep't Employes'* v. *Hanson,* the Court ruled that collective bargaining agreements negotiated under the RLA could be challenged on constitutional grounds if they

---

Mfg. Co. v. *Grand Lodge Int'l Ass'n of Machinists,* 216 F.2d 326 (6th Cir. 1954).

[78] I. Brant, *James Madison: The Nationalist* 354 (1948) (quoting Thomas Jefferson) *cited in Abood,* 431 U.S. at 234 n. 31.

[79] *Abood,* 431 U.S. at 235, *quoting West Virginia Bd. of Educ.* v. *Barnette,* 319 U.S. 624, 642 (1943).

[80] *Vaca* v. *Sipes,* 386 U.S. at 182 (interpreting section 9(a) of the NLRA), *citing Steele* v. *Louisville & N.R. Co.,* 323 U.S. at 198-199, 230-232 (interpreting Section 2, Fourth of the RLA).

[81] *Id.*

[82] *Id.*

contained union shop provisions. Citing its decision in *Steele* construing section 2, Fourth as authority, the Court stated that, "[t]he enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates . . . ."[83]

In *Abood* v. *Detroit Bd. of Educ.*, the Court was required to pass on the constitutionality of a collective bargaining agreement that contained an agency shop provision as it was applied to state employees.[84] The agreement was negotiated under the authority of a state statute the Court described as being modeled on both the RLA and *the NLRA*.[85] The Court rejected the argument that either collective bargaining or agency shop were unconstitutional in the public sector. The Court did conclude that agency shop in the public sector was subject to the same limitations fashioned in *Street* and *Allen*.[86] The Court observed that public-sector employees do not have "weightier First Amendment interest[s]" than private employees,[87] and also stated that:

> Public employees are not basically different from private employees . . . . The very real differences between exclusive-agent collective bargaining in the public and

---

[83] 351 U.S. at 232. Petitioner argues that governmental action attaches to RLA collective bargaining agreements solely because the RLA "displaces" state right-to-work laws. The RLA does not contain a provision similar to section 14(b) of the NLRA, 29 U.S.C. § 164(b), and, as a result, state governments do not have the authority to prohibit union shop agreements in the railway or airline industries. Petitioner's argument does not contemplate the reality that agency shop agreements exist because of collective bargaining and that collective bargaining exists in the 1980s by virtue of section 9(a) of the NLRA and section 2, Fourth of the RLA. However, even petitioner's argument, if carried to its logical conclusion, supports a finding of state action. Both section 9(a) and section 2, Fourth operate to "displace" contrary state laws that would otherwise allow employees to negotiate their own contracts of employment. *See supra*, n. 64.

[84] 431 U.S. 209 (1977).

[85] 431 U.S. at 223.

[86] 431 U.S. at 237-242.

[87] 431 U.S. at 229.

> private sectors are not such as to work any greater infringement upon the First Amendment interests of public employees . . . .
>
> The differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights.[88]

The decision in *Abood* clearly states that *all* private-sector employees are entitled to the *same* protection afforded public-sector employees by the First Amendment. The Court's most recent decision interpreting section 2, Eleventh of the RLA further reinforces the conclusion that the First Amendment protections recognized for public sector and RLA employees apply with equal force to NLRA employees:

> The First Amendment does limit the uses to which the union can put funds obtained from dissenting employees [citation omitted]. But by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights.[89]

Whether an employee is employed by an employer within the jurisdiction of the RLA or the NLRA, the effect on him of a collective bargaining agreement that contains a union shop provision is identical. Under both circumstances, the dissenting employee "is forced to financially support an organization with whose principles and demands he may disagree."[90]

In 1980, Congress recognized the constitutional impact of Section 9(a) of the NLRA by enacting section 19 of the NLRA. Under section 19, any employee who is a member of a *bona fide* religion that has historically held conscientious objections to joining or financially supporting a union, cannot be required to join or support a union as a condition of employment.[91] Section 19 was viewed by its sponsors as effecting an accommodation of the rights of individual em-

---

[88] 431 U.S. 229, 230, 232.

[89] *Ellis* v. *Bhd. of Ry. Clerks*, 466 U.S. at 455.

[90] *Id.*

[91] 29 U.S.C. § 169.

ployees to freedom of religion under the *First Amendment* and the statutory privileges that have been granted to collective bargaining agents.[92]

A finding of governmental action in this case will neither open a Pandora's box nor destroy our established system of labor relations. Congress has declared that the important governmental interest in industrial peace is furthered by collective bargaining. The sacrifice of individual rights resulting from exclusive representation and collective bargaining is therefore justified to the extent employees are compelled to accept a union as their collective bargaining agent.[93] Industrial peace is also enhanced to the extent that employees who share in the "benefits" of collective bargaining are required to share in the expenses associated with collective bargaining to eliminate the problem of the "free-rider."[94]

No governmental interest can possibly be served by compelling employees to subsidize a union's political activities. A union is able to compel financial support from dissenting employees only by virtue of its statutory status as exclusive representative. Because the conduct challenged by plaintiffs is directly related to the CWA's grant of "monopoly power" under Section 9(a), plaintiffs have stated a claim under the First Amendment.[95]

---

[92] *See* 126 Cong. Rec. 2579-86, 2652-53, 34006-34007 (1980); H.R. Rep. No. 96-496, 96th Cong., 2d Sess. (1980).

[93] *J. I. Case Co.* v. *NLRB*, 321 U.S. 332, 337-39 (1944); *Abood*, 431 U.S. at 220-221.

[94] *Ellis*, 466 U.S. at 455; *Radio Officers' Union* v. *NLRB*, 347 U.S. at 41.

[95] *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 335, 352 (1974). In *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), the Court was called upon to determine the legality of an affirmative action plan that had been collectively bargained by an employer and a collective bargaining representative. The plaintiff contended that the plan violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Plaintiff *did not* contend that the plan violated the Equal Protection Clause of the Fourteenth Amendment and *did not* brief the issue of state action. *See Law Reprints Labor*

II. Section 8(a)(3) of the NLRA should be given the same construction this Court has given Section 2, Eleventh of the RLA

It is a "cardinal principle" of statutory construction that this Court will ascertain whether a construction of a statute is "fairly possible" by which any constitutional questions may be avoided.[96] Two different statutes should be given the same construction when they share the same purpose and the same language, and when the legislative history shows that one of the statutes was the source for the other.[97] These principles of statutory construction have special significance here since "it would be difficult, if not impossible, to find two statutes more identical in language and legislative purpose than section 8(a)(3) of the NLRA and section 2, Eleventh of the RLA."[98]

Both the NLRA and the RLA were enacted to facilitate the free flow of commerce and to enhance industrial peace through the process of collective bargaining.[99] The collective bargaining process under both statutes rests upon the concept of exclusive representation.[100] Both section 9(a) and section 2, Fourth "extinguish" the right of an individual employee to order his own employment relationship. Under section 8(a)(3) and section 2, Eleventh, unions

---

Series, Vol. 12, no. 13, '78, '79 Term, Brief for the Respondents in *United Steelworkers* v. *Weber*, at 417, 474. Despite the fact that plaintiff had not raised the issue, the Court stated *sua sponte* that since "the . . . plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause . . . ." 443 U.S. at 193. To the extent this statement is incompatible with the position asserted by the *amicus curiae*, it is also equally in conflict with the Court's rulings in *Steele*, *Hanson*, *Street*, *Allen*, *Allis-Chalmers*, *Vaca*, *Abood*, and *Ellis*.

[96] *Street*, 367 U.S. at 749, *quoting Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).

[97] *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979); *Northcross* v. *Bd. of Educ. of Memphis City Schools*, 412 U.S. 427, 428 (1973).

[98] *Beck*, 776 F.2d at 1187.

[99] 29 U.S.C. § 151; 45 U.S.C. § 151a; *Street*, 367 U.S. at 760.

[100] 29 U.S.C. § 159(a); 45 U.S.C. § 152 Fourth.

and employers are granted the statutory authority to negotiate agreements that require "membership" as a condition of employment.[101]

Section 8(a)(3) was added to the NLRA in 1947 by the Taft-Hartley Act.[102] The purpose of section 8(a)(3) was to eliminate the perceived problem of the "free-rider." Congress concluded that NLRA unions should be allowed to seek agreements that require "membership" as a condition of employment so that all employees who enjoy the "benefits" of collective bargaining also share in the costs of the bargaining process.[103]

Prior to 1950, Congress had denied railway unions the authority to negotiate union shop agreements.[104] Congress responded to the petitions of railway unions that they be accorded the *same privileges* enjoyed by unions under the NLRA by enacting section 2, Eleventh.[105] In drafting section 2, Eleventh, Congress "tracked the language of section 8(a)(3) of the Taft-Hartley Act."[106] The legislative history of section 2, Eleventh is replete with representations that the intent of Congress was to confer on railway unions the *same* rights enjoyed by unions under section 8(a)(3) of the NLRA.[107]

Neither section 8(a)(3) nor section 2, Eleventh limit or qualify on their face the types of "membership" that can be required under collective bargaining agreements.

---

[101] 29 U.S.C. § 158(a)(3); 45 U.S.C. § 152 Eleventh.

[102] 61 Stat. 136 (1947).

[103] *Beck*, 776 F.2d at 1196; S.Rep. No. 105, 80th Cong., 1st Sess. 6-7 (1947); Legislative History of the Labor-Management Relations Act, 1947, at 413, 1422 (1948) (statements of Senator Taft); *NLRB* v. *General Motors Corp.*, 373 U.S. at 740-41; *Radio Officers' Union* v. *NLRB*, 347 U.S. at 41.

[104] *Street*, 367 U.S. 750-764; *Beck*, 776 F.2d at 1197.

[105] 67 Stat. 1238 (1951).

[106] *Beck*, 737 F.2d at 1197, *citing* T. Haggard, *supra* n. 14.

[107] *Id.*; *See also* 96 Cong.Rec. 15,737, 16,267 (1950); S.Rep.No. 2262, 81st Cong., 2d Sess. 3, 5 (1950); H.R.Rep.No. 2811, 81st Cong., 2d Sess. 405 (1950).

Nonetheless, in *Radio Officers' Union* v. *NLRB*, this Court squarely held that formal membership could not be required under section 8(a)(3):

> [The] legislative history [of the Taft-Hartley Act and section 8(a)(3)] clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions' concern about "free riders," i.e., employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and *gave unions the power to contract to meet that problem* . . . .[108]

The effect of the Court's decision in *Radio Officers Union* was to "whittle" the definition of membership under section 8(a)(3) to its financial core.[109] The limits to financial "membership" under section 2, Eleventh were established by the Court's decision in *Street*:

> The conclusion to which [a review of the legislative history of section 2, Eleventh] clearly points is that § 2, Eleventh contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes. One looks in vain for any suggestion that Congress also meant in § 2, Eleventh to provide unions with a means for forcing employees, over their objection, to support political causes which they oppose.[110]

This Court has never had the opportunity, before the instant case, to explain the limits to financial "membership" under section 8(a)(3). The RLA and the NLRA are both designed to accomplish the same essential purpose (the enhancement of industrial peace through the process of collective bargaining). The language selected by Congress for section 2, Eleventh tracks the language of section 8(a)(3). Since both section 8(a)(3) and section 2, Eleventh were enacted to give collective bargaining repre-

---

[108] 347 U.S. at 41 (emphasis added).

[109] *NLRB* v. *General Motors Corp.*, 373 U.S. at 742.

[110] 367 U.S. at 363, 364.

sentatives "the power" to meet the "problem" of the "free-rider," "[i]t is inconceivable that [the] two statutes would be construed differently."[111]

For purposes of statutory construction, legislative observations made years after the enactment of a statute are in no sense part of the legislative history.[112] It is still worth bringing to the Court's attention that members of Congress also find it "inconceivable" that this Court's interpretation of section 2, Eleventh does not also apply to section 8(a)(3). Legislation has been offered in both the House of Representatives and the United States Senate to amend the Federal Election Campaign Act of 1971 ("FECA"), to prohibit the use of compulsory union dues for political purposes.[113] Amendments to the FECA have been defeated on the express ground that the proposed legislation is unnecessary since the decisions in *Street, Allen, Abood,* and *Ellis* have already restricted the uses to which compulsory dues can be put under the NLRA.[114]

Particular provisions of a statute must be interpreted so that other provisions of the same statute are not rendered inoperative.[115] Statutory phrases will not be construed in isolation, but instead will be interpreted within the context of the whole statute.[116] Congress intended to enhance the free flow of interstate commerce when it enacted the NLRA

---

[111] *Beck,* 776 F.2d at 1197, 1198.

[112] *Oscar Mayer & Co.* v. *Evans,* 441 U.S. at 758.

[113] 2 U.S.C. §§ 431-455.

[114] 130 Cong. Rec. 6178-81 (daily ed. May 22, 1984); 132 Cong. Rec. 5553-54 (daily ed. Aug. 6, 1986); *see also* Appendix, at 7a-29a (Letters of the following Members of Congress to Constituents: Senator Patrick J. Leahy; Senator John H. Chafee; Senator Christopher J. Dodd; Senator Mark Hatfield; Representative Robin Tallon; Representative Nancy L. Johnson; Representative Robert W. Kastenmeier; Representative Bill Hefner; Representative Bill Richardson; Representative Gerald D. Kleczka; and Representative Richard H. Lehman).

[115] *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana,* 472 U.S. 237 (1985); *Colautti* v. *Franklin,* 439 U.S. 379, 392 (1979).

[116] *United States* v. *Morton,* 467 U.S. 822, 828 (1984).

by "encouraging" both the process of collective bargaining *and* "the exercise by workers of full freedom of association." [117] Congress encouraged the exercise of full freedom of association by enacting Section 7 of the NLRA.[118] Section 7 grants employees the statutory right to engage in union activity *and* the statutory right to *refrain* from union activity. The right to refrain from union activity has been limited only "to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in [section 8(a)(3)] . . . ." [119]

Several conclusions must be drawn from a reading of section 7 of the NLRA. The statutory right to refrain from union activity cannot be reduced or burdened merely because of an agreement reached between an employer and a collective bargaining representative. Instead, the only permissible limits that can be placed on the right to refrain from union activity are those limitations that have been expressly authorized by Congress under section 8(a)(3). Any union security agreement that goes beyond the "membership" obligations authorized by section 8(a)(3) is therefore prohibited by section 7.

Petitioners argue that section 8(a)(3) grants unions the authority to negotiate collective bargaining agreements that require dissenting employees to support union political activities as a condition of employment. Such an interpretation renders section 7 completely inoperative as it relates to individual employees like the plaintiffs who have been placed in a bargaining unit without their consent and who have had a bargaining agent imposed on them under the authority of federal law. Petitioners cannot rationally argue that the NLRA operates to "encourage" full freedom of association" if employees who find themselves in the same circumstances as plaintiffs can be forced under the au-

---

[117] 29 U.S.C. § 151.

[118] 29 U.S.C. § 157.

[119] *Id.*

thority of section 8(a)(3) to support candidates and causes they violently oppose.

In contrast, application of the *Street - Ellis* principles to the NLRA will effectuate the policies underlying both section 7 and section 8(a)(3) by giving both sections "the most harmonious, comprehensive meaning possible." [120] The "problem" of the "free-rider" will be eliminated if section 8(a)(3) is interpreted as authorizing agreements that require dissenting employees to share in the costs of collective bargaining. In addition, the statutory right to refrain from union activity and the intent of Congress to encourage "full freedom of association" will be vindicated if dissenting employees cannot be compelled under the authority of section 8(a)(3) to subsidize political activities as a condition of employment.

CONCLUSION

The relief sought by plaintiffs is neither trivial nor unique. James Madison, the author of the First Amendment, wrote in defense of religious liberty, "[w]ho does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" [121] The principle that all Americans should be free to choose the groups and political causes they support is basic to our concept of individual liberty. Hundreds of thousands, possibly millions, of employees have since 1935 been forced under authority of federal law to subsidize the political activities of the CWA and other unions. By sustaining the decision below, this Court will restore to plaintiffs and countless other employees fundamental freedoms that are their birthright as American citizens.

---

[120] *Weinberger* v. *Hynson, Wescott, and Dunning, Inc.*, 412 U.S. 609, 633 (1973).

[121] 2 *The Writings of James Madison* 186 (Hunt ed. 1901), *quoted in Abood*, 431 U.S. at 234 n. 31.

Respectfully submitted,

*THOMAS A. FARR
W. W. TAYLOR, JR.
ROBERT A. VALOIS
MAUPIN TAYLOR ELLIS & ADAMS, P.A.
3201 Glenwood Avenue
Raleigh, North Carolina 27612
Telephone: (919) 781-6800

Counsel for Senators Jesse Helms, et al., *as* amicus curiae

**Counsel of Record*